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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
PETITIONER

v.

HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE OF THE
SPERRY MASTER RETIREMENT TRUST No. 2

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether petitioner, an insurance company, is a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, with respect to assets it holds in its general account under a contract that provides for the purchase of fully guaranteed fixed annuities for pension plan participants and beneficiaries.

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INTEREST OF THE UNITED STATES

This case raises an important issue concerning the scope of coverage of the fiduciary responsibility provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001-1168. The Secretary of Labor has general administrative responsibility for interpreting the definitional and coverage provisions of that Title, and for enforcing the fiduciary standards it imposes.

STATEMENT

1. In Section 3(21)(A) of ERISA, Congress provided that a person is a "fiduciary" with respect to a pension plan "to the extent * * * he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. 1002(21)(A). While Congress did not specify what constitute the "assets" of a pension plan, it provided in Section 401(b)(2) of ERISA, 29 U.S.C. 1101(b)(2), that:

In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer.

Congress further provided, in Section 401(b)(2)(B) of ERISA, 29 U.S.C. 1101(b)(2)(B), that:

The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

2. The parties in this case dispute whether a contract known as Group Annuity Contract (GAC) 50 is a "guaranteed benefit policy" under Section 401(b)(2). GAC 50 originally was issued by petitioner John Hancock Mutual Life Insurance Company in 1941 to the Sperry Corporation (which is now Unisys). Respondent Harris Trust and Savings Bank is the trustee of Unisys's pension plan. Since 1968, GAC 50 has been an "immediate participation guarantee" (IPG) contract, which is a common method of funding pension benefits. See K. Black & H. Skipper, *Life Insurance* 496-497 (11th ed. 1987); D. McGill & D. Grubbs, *Fundamentals of Private Pensions*

562-564 (6th ed. 1989). Under an IPG contract, as long as the contract is in its "active phase," the pension plan participates in the investment experience of the insurer's "general account." A general account is available to satisfy the insurance company's obligations to all of its policyholders, and also serves as the insurance company's operating account, which it uses for its ordinary business expenses.¹

In 1968, Hancock established an accounting fund called the "pension administration fund" under GAC 50. Hancock guaranteed the payment of all pension benefits earned under the Sperry pension plan up to 1968, and also promised to guarantee the payment of pension benefits to all of the plan's retirees in the future as long as the balance in the pension administration fund exceeds the "liabilities of the fund" by at least five percent. The liabilities of the fund represent the cost of the benefits guaranteed by Hancock. Pursuant to the contract, Hancock allocates a share of the investment income earned by its general account to the GAC 50 pension administration fund, and promises that the cumulative net share allocated to the pension administration fund will not be less than \$0. Pet. App. A23-A25.

The "active phase" of an IPG contract terminates once the balance in the pension administration fund fails to exceed the liabilities of the fund by the amount specified in the contract—in this case, five percent. Upon termination, the insurance company uses the amount credited to the pension administration fund to purchase fully guaranteed annuities pursuant to terms fixed by the contract, and the fund ceases to exist. K. Black & H. Skipper, *Life Insurance*, *supra*, at 497. The active phase of GAC 50, the contract at issue in this case, has not yet

¹ The insurance industry estimates that it holds more than \$500 billion dollars in general accounts pursuant to contracts with pension plans. Amicus Br. of the American Council of Life Insurance in Support of the Petition for a Writ of Certiorari at 1.

terminated, because the amount Hancock credited to the pension administration fund has always exceeded the liabilities of the fund by at least five percent.

In 1977, the parties amended GAC 50 to provide that Hancock would no longer automatically guarantee the payment of benefits to employees retiring in the future. Although the plan retains the option to direct Hancock to guarantee benefits to retiring employees, the plan has not done so since 1977 because it considers the purchase of benefits under GAC 50 to be too costly.² The plan has instead turned to other sources to pay benefits as they become due. In fact, although Hancock has not guaranteed the payment of any benefits since 1977, from time to time the plan has requested Hancock to use the "free funds" in the pension administration fund—that is, the amounts credited to the pension administration fund in excess of 105 percent of the liabilities of the fund—to pay certain benefits to plan beneficiaries. The plan has done so pursuant to a provision in the 1977 amendment of GAC 50 that authorizes such payments, which are called "non-guaranteed benefits" because Hancock would simply make payments to a retiree at times specified by the plan without guaranteeing the payment of any future benefits. Hancock paid "non-guaranteed benefits" from the free funds on a number of occasions until 1982, when Hancock exercised its option to terminate the payment of such benefits. Pet. App. A6; J.A. 98.

The parties disagree about the amount of the free funds remaining in the pension administration fund, but by either party's measure the "free funds" have greatly increased since the early 1970s. That increase resulted

² The plan considers the annuities available under GAC 50 to be too costly because interest assumptions specified in 1968 are used to determine the present value of future benefits. The interest rates assumed in 1968 have been low compared to the relatively high market rates that have prevailed during much of the last 20 years, making the purchase price of annuities under GAC 50 relatively high.

from the pension administration fund's continued participation in Hancock's investment experience, combined with the plan's decision not to have Hancock guarantee the payment of any additional benefits. Thus, the pension administration fund has grown but the liabilities of the fund have not. Under GAC 50, the plan may transfer the free funds out of the pension administration fund. The plan has considered that option to be uneconomical, however, because a transfer would be subject to an asset liquidation adjustment under which the book value of certain assets would be converted to their market value, which would be substantially lower. See J.A. 96.³

3. In 1983, Harris Trust's predecessor as the plan's trustee filed suit against Hancock in the United States District Court for the Southern District of New York. The amended complaint alleged numerous violations of ERISA's fiduciary provisions, including denial of access to the accumulating "free funds." It also charged that Hancock had violated its fiduciary duties by holding the plan to the terms of a contract that was not particularly favorable in light of the prevailing high interest rates. The amended complaint alleged various contract and common law claims as well. The trustee sought damages for losses resulting from the alleged violations, removal of Hancock as fiduciary, and other equitable relief. Harris Trust and Hancock each filed motions for partial summary judgment on the issue of whether Hancock is a fiduciary under ERISA. Pet. App. A6-A7; J.A. 49-71.

The district court held that Hancock is not a fiduciary because GAC 50 is a "guaranteed benefit policy" under Section 401(b)(2) of ERISA, which provides that the assets received by an insurer under such a policy are not plan assets. Section 401(b)(2)(B) defines "guaranteed benefit policy" as "an insurance policy or contract to the extent

³ In 1988, the parties reached an agreement pursuant to which the plan removed \$53 million from the pension administration fund. Pet. App. A25.

that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." The district court first concluded that GAC 50 is an "insurance policy or contract" because it "places the insurance risks on the insurer, not on the plan's covered employees." Pet. App. A53.⁴ The district court next rejected Harris Trust's argument, premised on the plan's participation in the investment experience of Hancock's general account, that GAC 50 does not provide for "benefits the amount of which is guaranteed by the insurer." The court explained that "Harris Trust's argument rests on a misinterpretation of the word 'benefit' in the statute." *Id.* at A57. The court noted that "[e]ach time ERISA uses the word 'benefit,' it refers to the payments made to the employees themselves." *Ibid.* "Because GAC 50 provides for fixed payments to covered employees," the court held that "it is covered by the guaranteed benefit policy exception." *Id.* at A58.

The district court found support for its conclusion in Interpretive Bulletin (IB) 75-2, which the Department of Labor issued shortly after ERISA's enactment. IB 75-2 stated that "if an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets." See Pet. Br. App. A100. Thus, the court reasoned, the Department of Labor had concluded shortly after ERISA's enactment that assets like those held by Hancock pursuant to GAC 50 are not plan assets. Pet. App. A61. Accordingly, Hancock is not a fiduciary because

⁴ The district court explained that Hancock, among other things, "guarantees benefit payments to pre-1968 covered employees and their beneficiaries in fixed amounts, regardless of any increases in life expectancy tables and regardless of the investment experience of Hancock's general account and its corresponding credit to the [pension administration fund]," and also "guarantees that post-1968 eligible employees will receive fixed payments on retirement." Pet. App. A54.

ERISA defines a fiduciary as a person who manages plan assets. See 29 U.S.C. 1002(21)(A); Pet. App. A47-A48.

On that basis, the district court granted Hancock's motion for partial summary judgment on Harris Trust's ERISA claims. Pet. App. A62. In a separate opinion, the court later dismissed Harris Trust's contract and common law claims. *Id.* at A63-A87.

4. The Second Circuit reversed with respect to Hancock's status as a fiduciary under ERISA. Pet. App. A1-A18. While acknowledging that GAC 50 is a guaranteed benefit policy "at least to the extent it provides for benefits guaranteed by Hancock," *id.* at A8, the court of appeals concluded that GAC 50 is a guaranteed benefit policy only to that extent. It held:

Although Hancock provides guarantees with respect to one portion of the benefits derived from the contract, it does not do so at all times with respect to all the benefits derived from the other, or free funds, portion. The non-guaranteed portion is dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides.

Id. at A8-A9. The court found primary support for its interpretation in the legislative history, noting that the Conference Report indicates that if a policy "guarantees basic payments but other payments may vary with, *e.g.*, investment performance," the variable portions "are to be considered as plan assets subject to the fiduciary rules." *Id.* at A9 (quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 296 (1974)).

The court of appeals also relied on the Seventh Circuit's decision in *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 327 (1983), which held that any funds that have not been converted to fixed annuities are plan assets. Pet. App. A9-A10. Correspondingly, the court rejected the interpretation by the Third Circuit in *Mack Boring & Parts v.*

Meeker Sharkey Moffitt, Actuarial Consultants, 930 F.2d 267, 273, 277 (1991). The Third Circuit, like the district court in this case, held that a general account contract that provides for "guaranteed benefits to plan participants at some finite point in the future" is a guaranteed benefit policy in its entirety, even if, prior to the conversion of contract funds to fixed annuities, the amount credited to the pension administration fund for a plan varies depending on the performance of the general account. Pet. App. A10-A11 (quoting 930 F.2d at 273).

The court of appeals recognized that the Interpretive Bulletin issued by the Department of Labor shortly after ERISA's enactment—and confirmed in a regulation adopted in 1986, 29 C.F.R. 2509.75-2—seemed to call for a contrary result. Pet. App. A12. However, relying on the fact that IB 75-2 related to prohibited transactions, the court found "no inconsistency in considering certain assets to be plan assets for general fiduciary duty purposes but not for prohibited transaction purposes." *Id.* at A13. Thus, the court concluded that the same assets should not be considered plan assets under Section 406 of ERISA, 29 U.S.C. 1106, which prohibits fiduciaries from using plan assets for various purposes, yet should be considered plan assets under Section 404 of ERISA, 29 U.S.C. 1104, which sets out the general duties of fiduciaries with respect to plan assets. The court also thought that two advisory opinions issued by the Department of Labor in 1978 and 1983—neither of which involved funds held in a general account for the purpose of providing fixed annuities—contradicted IB 75-2. Pet. App. A11-A12.⁵

⁵ While disagreeing with the district court and holding that Hancock is a fiduciary with respect to some of the assets it holds pursuant to GAC 50, the court of appeals "agree[d] with the district court that the contract itself, GAC 50, is not a plan asset as to which Hancock has a fiduciary responsibility." Pet. App. A13. The court of appeals also agreed with the district court that Hancock had not

Having divided GAC 50 into different components according to whether or not particular amounts credited to the pension administration fund under the contract were excess ("free") funds, the court of appeals reversed the judgment of the district court "to the extent that it determined that Hancock had no fiduciary duty with regard to the excess funds allocated to the payment of non-guaranteed benefits." Pet. App. A18. It therefore remanded the case for further proceedings consistent with the decision. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals should have affirmed the district court's decision, which reflects the Department of Labor's consistent interpretation of Section 401(b)(2) of ERISA. Affirmance of the court of appeals' judgment would upset long-standing practices by mandating changes in the manner in which insurers and pension plans have done business. We know of no sound basis for causing such disruption.

A. In 1975, shortly after ERISA was enacted, the Department of Labor issued IB 75-2, which stated that funds held by insurance companies in their general accounts are not plan assets. In 1978, the Department modified its position somewhat in Advisory Opinion (AO) 78-8A, which stated that general account funds are plan assets if they provide for the payment of variable annuities rather than fixed annuities. But the Department afterward reaffirmed IB 75-2 in regulations promulgated in 1986. Thus, the Department's position is that a "guaranteed benefit policy" is a contract pursuant to which an insurer holds assets in its general account to guarantee the payment of fixed annuities to plan beneficiaries.

In our view, the language of Section 401(b)(2)(B) is ambiguous. However, the Department's interpretation is

violated the terms of GAC 50 in 1982 when it refused to pay additional "non-guaranteed benefits." *Id.* at A18.

consistent with the text. Section 401(b)(2)(B) defines "guaranteed benefit policy" as "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." As the district court concluded, the contract at issue in this case (GAC 50) is "an insurance policy or contract," even though it has some characteristics of an investment contract, because Hancock has assumed significant risks in connection with its guarantee to provide benefits to plan participants and beneficiaries. Moreover, since all of the funds received by Hancock pursuant to GAC 50, along with the earnings attributable to those funds, have been available to provide for fixed annuity payments as long as they were held in Hancock's general account, it "provides for benefits the amount of which is guaranteed by the insurer."

B. The legislative history lends support to the Department of Labor's interpretation of Section 401(b)(2). The Senate bill had categorically provided that ERISA's fiduciary standards would not apply to assets held by insurance companies in their general accounts. While the Conference Committee revised that provision, we think that it probably intended only a relatively modest change, most likely to ensure that assets held in general accounts would be considered plan assets if they were to be used to provide variable annuities.

C. Harris Trust's position would lead to significant changes in the way insurance companies and pension plans do business, because insurance companies commingle the assets in their general accounts and use them for a variety of purposes, including paying the insurance company's own operating expenses. Those practices would be difficult to square with ERISA's requirement that plan assets must be used exclusively to provide benefits or to defray reasonable administrative expenses. It would also be difficult to reconcile the insurance industry's practices with ERISA's prohibited transaction rules, which bar

fiduciaries from using plan assets for a variety of purposes.

D. The Department of Labor's construction of Section 401(b)(2) warrants deference, because it was developed contemporaneously with ERISA's enactment and has been followed since that time. Contrary to the court of appeals' belief, the interpretation provided in IB 75-2 was not contradicted by AO 78-8A, but rather was modified in a manner that gives full effect to the statutory language. The Department has never disavowed IB 75-2, but instead repromulgated it in 1986. Furthermore, contrary to the court of appeals' suggestion, IB 75-2 cannot be limited to ERISA's prohibited transaction rules. It must also apply to ERISA's other fiduciary requirements, because there is neither a textual basis nor a sound policy reason to hold that the same assets are "plan assets" for purposes of Section 404 of ERISA (the general fiduciary duty provision), but not for purposes of Section 406 (the prohibited transaction provision).

ARGUMENT

AN INSURANCE COMPANY IS NOT A FIDUCIARY WITH RESPECT TO ASSETS HELD IN ITS GENERAL ACCOUNT THAT PROVIDE FOR THE PAYMENT OF FIXED ANNUITIES

This case involves the construction of Section 401(b)(2) of ERISA. That Section provides that the assets of a pension plan do not include assets held by an insurer pursuant to a "guaranteed benefit policy." Section 401(b)(2)(B) defines "guaranteed benefit policy" as "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." Section 401(b)(2) was drafted by the Conference Committee, and, like other provisions of ERISA that were written in conference, it is "perhaps * * * not a model of legislative drafting." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

Moreover, it is not possible to interpret the phrase "guaranteed benefit policy" in light of its prior usage in the industry, because the term was coined by the Conference Committee and had "never been a part of the insurance industry lexicon." Goldberg & Altman, *The Case for the Nonapplication of ERISA to Insurers' General Account Assets*, 21 Tort & Ins. L.J. 475, 482 (1986).

Unlike either party, we think the statutory definition of "guaranteed benefit policy" is ambiguous, and does not clearly answer the question presented by this case. In those circumstances, the meaning of Section 401(b)(2)(B) must be derived not only from its language, but also from the structure, history, and purposes of the Act. The government takes the view, supporting petitioner, that a "guaranteed benefit policy" includes an insurance contract pursuant to which assets are deposited in an insurer's general account to provide for the payment of fixed annuities. Moreover, it is the government's view that such a contract is a "guaranteed benefit policy" even if the contract also provides that the pension plan participates in the insurer's investment experience.⁶ The court of appeals' narrower construction of Section 401(b)(2)(B)—that a contract is not a guaranteed benefit policy "to the extent that" it is "dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides" to the plan, Pet. App. A9—also finds support in the statutory text and has some advantages as a matter of policy. But, as discussed more fully below, from ERISA's earliest days, the Secretary of Labor took the broad view, expressed in IB 75-2, that assets placed in a general account "shall not be considered

⁶ The pension plan itself, however, is nonetheless an ERISA plan (see 29 U.S.C. 1003), subject to the reporting, vesting, and funding requirements set out in the Act. In addition, the plan's trustee is a fiduciary subject to all of ERISA's fiduciary requirements (see 29 U.S.C. 1103(a)), even if the insurance company from which the plan purchases annuities is not a fiduciary.

to be plan assets." Pet. Br. App. A100. That view, while modified to a limited extent in subsequent advisory opinions, was reconfirmed formally in 1986. Consistent with that view, the Department of Labor has brought no enforcement actions alleging that any of the many insurers that have held funds in their general accounts under contracts like GAC 50 were fiduciaries under ERISA. Compare *Bank America Corp. v. United States*, 462 U.S. 122, 130-131 (1963). In the absence of a strong justification, either in law or policy, for treating assets held by insurance companies in their general accounts as "plan assets" whenever the overall return to a pension plan varies with the investment experience of the insurance company, we see no reason to upset settled expectations and contractual relations that have built up over the years in reliance on the continued viability of that established (indeed contemporaneous) construction of the statute.

A. The Statutory Language Supports The Department Of Labor's Construction Of Section 401(b)(2)

1. The Department of Labor published an interpretation of Section 401(b)(2) shortly after ERISA went into effect in 1975. That interpretation, designated IB 75-2, stated that "[i]f an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets." See Pet. Br. App. A100. Three years later, AO 78-8A modified IB 75-2 somewhat by concluding that assets held in a general account are "plan assets" if they are used to provide variable annuities rather than fixed annuities. In AO 78-8A, the Department recognized that it had stated categorically in IB 75-2 that general account assets are not plan assets, but it explained that "IB 75-2 was based in part upon the Department's understanding that the various state laws which regulate

insurance companies prohibit an insurance company from placing premiums paid for variable annuity contracts in a general asset account." Pet. Br. App. A107. IB 75-2 was reissued in 1986. See 29 C.F.R. 2509.75-2; Pet. App. A97. Thus, the Department interprets Section 401(b)(2) to mean that assets deposited in an insurance company's general account pursuant to an insurance contract providing for the payment of fixed annuities to beneficiaries of a pension plan are not plan assets.

2. The language of Section 401(b)(2)(B) is consistent with the Department of Labor's interpretation, which the Third Circuit in *Mack Boring* concluded is the "more logical" reading of the statutory text. 930 F.2d at 271. Like the district court in this case, the Third Circuit first considered, as IB 75-2 also requires, whether the contract at issue was "an insurance policy or contract" under Section 401(b)(2)(B)'s definition of a "guaranteed benefit policy."⁷ The Third Circuit concluded that the contract was an insurance policy because it "involve[d] a guarantee that at least some fraction of the benefits will be payable in fixed amounts," and thus assured the shifting of some risk to the insurer. *Id.* at 272 (quoting *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 71 (1959)). In this case, the district court likewise concluded that the contract at issue is an insurance contract characterized by the bearing of "substantial risks" by Hancock. Pet. App. A54.

⁷ The contract at issue in *Mack Boring* was a standard "deposit authorization contract," which is similar to the "immediate participation guarantee" contract at issue here. K. Black & H. Skipper, *Life Insurance*, *supra*, at 496. Under the deposit authorization contract in *Mack Boring*, funds were deposited in an insurance company's general account, and the pension plan participated in "the investment, mortality or expense experience of the insurer," although with a minimum guarantee of interest. 930 F.2d at 268. "The insurance company [was] contractually bound to use the entire accumulation fund, including accrued interest and without market value change, to purchase annuities for plan participants upon their retirement, utilizing a schedule of annuity purchase rates specified in the contract." *Id.* at 269.

The court of appeals concurred that the contract is a "guaranteed benefit policy" (and therefore an "insurance policy or contract") "at least to the extent it provides for benefits guaranteed by Hancock." *Id.* at A8.⁸

There is no question that the pension plan bears some risk depending on the performance of Hancock's general account, and that GAC 50 therefore has some characteristics of an investment contract. But we agree with the district court that GAC 50 is also an insurance contract. An insurance company bears a substantial risk throughout the life of an IPG contract such as the one at issue in this case. Once the "active phase" of the IPG contract terminates, the insurance company bears the investment, mortality, and expense risks associated with providing the fixed annuities it has promised to pay. And, "[o]f course, the company is under a substantial risk during the active status of the contract, since it has provided a guaranteed price structure that the employer can unilaterally decide to take advantage of at any time that it feels the probable future course of investment, mortality, and expense risks will be such that it will be to its advantage to shift the risk to the life insurance company." K. Black & H. Skipper, *Life Insurance*, *supra*, at 497. Thus, as the district court recognized, Hancock guarantees the payment of all retirement benefits earned under the plan before 1968, as well as the payment of all benefits to plan participants who retired by 1977. Pet. App. A54. Moreover, the plan can trigger the issuance of fixed annuities at the rates set in GAC 50 by requesting Hancock to guarantee the payment of additional future benefits up to the point that the liabilities of the pension administration fund (plus five percent) equal the balance in the fund, thereby terminating GAC 50's "active phase." See page 3, *supra*.

⁸ By contrast, in *Peoria Union* the plan bore the entire investment risk, and the Seventh Circuit deemed the contract at issue to be an investment contract and not an insurance contract, both for purposes of ERISA and the federal securities laws. 698 F.2d at 324-327.

3. The Department's construction next considers whether the insurance contract "provides for benefits the amount of which is guaranteed by the insurer" under the definition of "guaranteed benefit policy" in Section 401(b)(2)(B). Central to this analysis is the conclusion that the term "benefits" in Section 401(b)(2)(B) refers to the payments made to the individual participants and beneficiaries of the plan itself, rather than to the return credited to the pension plan. See Pet. App. A57. As the Third Circuit explained in *Mack Boring*, 930 F.2d at 273, it is clear that "the term 'benefit,' when used in ERISA, uniformly refers only to payments due the plan participants or beneficiaries." See also Pet. App. A57; see, e.g., 29 U.S.C. 1002(7), 1002(8). Under ordinary principles of statutory construction, the word "benefits" should be read to have the same meaning here, unless there is evidence that Congress intended the word to carry a different connotation in this context. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992). There is no such indication. What is more, the word "benefits" is customarily used in the insurance industry to mean payments to beneficiaries. See Goldberg & Altman, 21 Tort & Ins. L.J. at 482.

This construction also gives full meaning to the phrase "provides for" in Section 401(b)(2)(B). The principal dictionary definition of "provide" is "[t]o furnish; supply." *The American Heritage Dictionary* 1053 (1976); accord *Black's Law Dictionary* 1388 (1968) ("[t]o make, procure, or furnish for future use, prepare"). Used with "for," the word "provide" can mean "[t]o take measures in preparation." *The American Heritage Dictionary*, *supra*, at 1053. Accordingly, the natural construction of "provides for" in Section 401(b)(2)(B) encompasses benefits guaranteed in the future, especially because any other reading would appear to render "for" superfluous. As the Third Circuit stated in *Mack Boring*, 930 F.2d at 273, "it is enough that the * * * contract 'provided' guaranteed benefits to plan

participants at some finite point in the future," by making all the funds associated with the contract available for that purpose. "Section 401(b)(2)(B) does not, on its face, require that the benefits contracted for be delivered immediately," and there is no reason to "read into the statute such a requirement." *Ibid.*⁹

The foregoing construction is also consistent with the connecting phrase "to the extent that." If the word "benefits" is understood to mean payments to individuals, then it becomes clear that an insurance contract is a guaranteed benefit policy "to the extent that" the benefit payments to individuals that the contract "provides for" are guaranteed in amount, as are fixed annuity payments. On the other hand, "to the extent that" a contract provides for variable annuity payments to individuals (either at present or in the future), then the contract is not a "guaranteed benefit policy." This was the interpretation adopted by the Third Circuit, which concluded that "[t]he phrase 'to the extent' was probably added to 'distinguish a

⁹ We recognize that the guarantees associated with the provision of fixed annuities in the future have less value than the guarantees associated with already purchased annuities, since, while the insurer can guarantee the purchase price and payout of an annuity purchasable in the future, it does not guarantee the total amount of assets that will be available for the purchase or that the guaranteed price will be reasonable at all times in the future. Significantly, however, this phenomenon is true whether or not the contractholder participates in the investment experience of the insurer, because external economic conditions alone (e.g., inflation) will affect the value of the guarantees. Moreover, the statute does not distinguish between levels of guarantees. Section 401(b)(2)(B) instead provides that a contract is a "guaranteed benefit policy" "to the extent that [it] provides for [guaranteed] benefits." Accordingly, application of the exception should not turn on whether, "in hindsight," the particular guarantees turned out to be a good deal for the plan. *Mack Boring*, 930 F.2d at 274, citing Pet. App. A56 ("[a]lthough interest rates have increased since 1968, they have been known to revert to their previous levels or lower, and, in that event, Hancock would still be obliged to guarantee those additional benefits").

contract under which fixed benefit annuity payments are promised from a contract under which the amount of some or all benefit payments is not guaranteed, such as a variable annuity contract under which the amount of benefit payments varies with the performance of a particular separate account.' " *Mack Boring*, 930 F.2d at 274 (quoting *Goldberg & Altman*, 21 Tort & Ins. L.J. at 483). In the Third Circuit's view, so long as all the assets are available to purchase fixed annuities for individual beneficiaries, it does not matter that the same assets provide a variable aggregate return to the plan in the interim. 930 F.2d at 274.

That interpretation is further supported by the second sentence of Section 401(b)(2)(B), which states that a guaranteed benefit policy "includes any surplus in a separate account, but excludes any other portion of a separate account." 29 U.S.C. 1101(b)(2)(B).¹⁰ Separate accounts held by or for pension plans customarily (but not always) provide for variable benefits, and thus they typically serve exclusively as investment vehicles. It is therefore entirely logical that Congress should treat most assets held in separate accounts as plan assets, and subject insurance companies to ERISA's fiduciary duty requirements with respect to the management of those accounts. The fact that the second sentence of Section 401(b)(2)(B) is addressed to separate accounts (and excludes them almost entirely from the definition of "guaranteed benefit policy") supports the conclusion that the first sentence of Section 401(b)(2)(B) (which contains the definition of "guaranteed benefit policy") is addressed to general accounts.

¹⁰ "Surplus" is money placed in an account by an insurance company from its own general funds. See H.R. Conf. Rep. No. 1280, *supra*, at 297 ("to the extent that insurance companies place some of their own funds in these separate accounts to provide for contingencies, this separate account 'surplus' is not to be subject to the fiduciary responsibility rules").

A standard IPG contract clearly "provides for benefits the amount of which is guaranteed by the insurer" under the Department of Labor's construction of that phrase because, under such a contract, the premiums received by the insurance company and placed in its general account are to be used to guarantee the payment of fixed annuities. In the case of GAC 50, we do not think that a different result should be reached for the period between 1977 and 1982 insofar as some of the "free funds" held in Hancock's general account (and allocated to the pension administration fund for the Sperry plan) were used to pay so-called "non-guaranteed benefits." That option does not change the essential character of the contract as a "guaranteed benefit policy," because at any time while held in the general account, all of the funds were available to provide fixed annuities to retirees, and Harris Trust could have triggered the issuance of the annuities by requiring Hancock to guarantee additional payments to individual plan beneficiaries. Accordingly, GAC 50 was a "guaranteed benefit policy" under Section 401(b)(2) after 1977, even though it allowed the plan to remove some of the free funds to make benefit payments while the contract was in its "active phase."¹¹

¹¹ Although we support petitioner Hancock in this case, we do not agree with the position, not previously briefed in this case but suggested by the American Council of Life Insurance (ACLI) in its amicus brief in support of the petition for a writ of certiorari (at 17 n.21), that Hancock is an "operating company" within the meaning of the plan asset regulation, 29 C.F.R. 2510.3-101(a)(2)(i), (c) (reproduced at Pet. App. A99-A100, A102). The plan asset regulation does not apply in this case, because GAC 50 does not constitute an investment in Hancock itself, as would be required by the plan asset regulation. 29 C.F.R. 2510.3-101(a)(2). Moreover, if the ACLI's position were adopted, the plan asset regulation would have the effect of reading Section 401(b)(2) out of ERISA, because funds paid to insurance companies would not, by virtue of the "operating company" regulation, be plan assets.

**B. The Department Of Labor's Interpretation
Of Section 401(b)(2) Is Consistent With
The Legislative History**

Although not definitive, the relatively scant legislative history lends support to the Department of Labor's construction. The Senate bill that preceded ERISA's enactment would have exempted all general account assets from treatment as plan assets: that bill provided that its fiduciary standards "shall not apply to * * * funds held by an insurance carrier unless that carrier holds funds in a separate account." S. 4, 93d Cong., 1st Sess. § 511 (1973). Had that provision been retained, there would be no doubt that general account contracts, such as the one at issue in this case, do not impose fiduciary obligations on insurers. Like respondent Harris Trust (Br. in Opp. 8), we presume that, because the Conference Committee rewrote the provision, Congress intended to accomplish a different result. Cf. *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended").

In our view, however, it is probable that Congress intended to accomplish only a rather modest tightening of the Senate proposal. Specifically, we believe that Congress most likely adopted the language in the definition of "guaranteed benefit policy" in Section 401(b)(2) in order to close a potential loophole that might have permitted insurers to avoid fiduciary responsibility while offering general account contracts that provided variable benefits to plan participants. Although contracts tied to the general accounts of insurance companies usually provide for the payment of fixed annuities, as State law generally requires (see AO 78-8A, Pet. Br. App. A107), there is no inherent reason why general account contracts could not provide for the payment of variable annuities instead.

Unfortunately, the Conference Report does not shed light on what motivated the Conference Committee to

rewrite the provision. The report simply states (1) that "[a]n insurance company * * * is not considered to hold plan assets if a plan purchases an insurance policy from it, to the extent that the policy provides payments guaranteed by the company"; (2) that if "other payments may vary with, *e.g.*, investment performance, then the variable part of the policy and assets attributable thereto are not to be considered as guaranteed"; and (3) "insurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered as plan assets." H.R. Conf. Rep. No. 1280, *supra*, at 296-297. The Conference Report's use of the word "payments" rather than "benefits" and its reference to the "variable part of the policy" make more plausible the court of appeals' inference that Congress was thinking of payments to plans rather than payments to plan beneficiaries, and intended to treat the portion of a pension administration fund that represents return on investment as "plan assets." But if that is what Congress meant, it presumably would have used "payments" rather than "benefits" in the text of Section 401(b)(2), not just in its legislative history. For that reason, we, like the Third Circuit, think that the Conference Report used "payments" to mean "benefits" paid to individuals in accordance with the typical way in which insurance companies "guarantee" payments under their contracts, and thus simply was distinguishing between contracts that provide for fixed annuities and contracts that provide for variable annuities. *Mack Boring*, 930 F.2d at 275. If, by contrast, the Conference Committee had intended to make a dramatic change from prior practice—by subjecting to ERISA's fiduciary requirements the vast amounts held by insurance companies under general account contracts such as the one at issue in this case simply because the return to the plan depends on investment experience—the Conference Report presumably would have mentioned that

change expressly. *Chisom v. Roemer*, 111 S. Ct. 2354, 2364 & n.23 (1991).

Furthermore, shortly after ERISA's enactment, Assistant Secretary of Labor Paul Fasser testified about IB 75-2 before the House oversight committee, making clear that the Department interpreted Section 401(b)(2) broadly, such that assets held in general accounts are ordinarily not considered to be plan assets. *Oversight on the Employee Retirement Income Security Act of 1974: Hearings on Public Law 93-406 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 390-391 (1975) [1975 Hearings]; see Pet. App. A58-A59. No member of the committee questioned the wisdom or correctness of that interpretation. Coming only seven months after the enactment of ERISA, the reaction of the oversight committee suggests that IB 75-2 was consonant with congressional intent and a permissible reading of the statute. See *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979).

C. Policy Considerations Counsel Against An Interpretation Of Section 401(b)(2) That Would Disrupt Established Practices In The Industry

The protections provided by ERISA do not extend solely to the treatment of participants and beneficiaries, to the exclusion of pension plans.¹² But it does not follow that Congress meant to treat as plan assets funds held in general account insurance contracts that provide variable investment returns to pension plans, while guaranteeing

¹² Congress enacted ERISA "to protect * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b). To that end, ERISA was intended "to improve the equitable character and soundness of private pension plans," H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973), and "is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income," H.R. Rep. No. 807, 93d Cong., 2d Sess. 8 (1974).

the payment of fixed annuities to plan beneficiaries. Rather, it is reasonable to infer from Congress's treatment of the insurance industry elsewhere in the Act that Congress did not regard that industry to be especially prone to the problems of asset mismanagement that gave rise to ERISA. Thus, ERISA exempts certain "insurance contract plan[s]" from its funding requirements (29 U.S.C. 1081(a)(2), (b)) and exempts all insurance contracts from trust requirements (29 U.S.C. 1103(b)(1), (2)), and the Conference Report expresses the understanding that investments by insurance companies generally meet the Act's diversification requirements. H.R. Conf. Rep. No. 1280, *supra*, at 305. Moreover, one reason for this different treatment of insurance contracts may be that ERISA saves state regulation of insurance from statutory preemption. See 29 U.S.C. 1144(b)(2)(A). As a result, relieving insurance companies from some of ERISA's requirements does not leave assets invested in insurance companies entirely unprotected.¹³

¹³ We do not think, however, that the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, precludes the application of ERISA to an insurer's actions under a general account contract, and leaves regulation exclusively to the States. That argument was correctly rejected by the district court. Pet. App. A27-A35. Nothing in the McCarran-Ferguson Act generally exempts "the business of insurance" from ERISA coverage. Rather, the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b). ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and specifically relates to the business of insurance. Indeed, as explained above (note 6, *supra*), ERISA subjects a guaranteed benefit policy to the other requirements of the Act, even if the insurance company is not held to fiduciary standards. Moreover, dual regulation under ERISA and state law is not an impossibility. Many requirements are complementary, and in the case of a direct conflict, federal supremacy principles require that state law yield. Pet. App. A29-A31.

At the same time, the interpretation of ERISA advanced by Harris Trust could significantly change the way insurance companies do business under general account contracts, including those with pension plans. As discussed above, monies paid into general account contracts are not segregated from other accounts, but are used for general corporate purposes, such as paying the insurance company's operating expenses and meeting obligations to other contractholders. Under those circumstances, it would be very difficult for insurance companies to meet ERISA's fiduciary standards. For example, ERISA imposes a duty of undivided loyalty to plan participants that cannot easily be squared with the use of general account assets for corporate objectives. Insurance companies could be required to justify many routine expenditures for corporate facilities, for the benefit of other contractholders, and for other purposes, in order to ensure compliance with ERISA's requirement that fiduciaries act "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A). It is unlikely that insurance companies could make the required showings as long as the assets were maintained in general corporate accounts and used for a multiplicity of corporate purposes.

Insurance companies also would have to comply with ERISA's prohibited transaction provisions. See 29 U.S.C. 1106; 26 U.S.C. 4975. Thus, as the Assistant Secretary of Labor stated in 1975, under Harris Trust's reading of Section 401(b)(2) an "insurance company could not invest its premium receipts in bonds or equity securities issued by any of the employers contributing to the policyholder plan, it could not allow any of these employers to lease space in a building on which it held a mortgage, and it could not purchase goods, services, or facilities from any one of those employers." 1975 *Hearings, supra*, at 390-391. While "these restrictions might have been manageable if

the insurance company insured the benefits of only one or a few plans, * * * some of the large carriers have sold policies to thousands of plans." *Ibid.* After consultation with the Internal Revenue Service, and applying "common sense," the Department of Labor issued IB 75-2 to make clear that it did not construe Section 401(b)(2) to require such results. *Ibid.*¹⁴

While it is not clear what degree of disruption would be caused by holding insurance companies to be fiduciaries under such contracts, there is little doubt that the disruptions and costs would be significant, both in terms of the administrative changes the companies would be forced to undertake (*e.g.*, segregation of plan-related assets into segmented or separate accounts, and re-allocation of operating costs to other policyholders) and in terms of the considerable exposure to the ensuing litigation that would be brought by pension plans and others alleging fiduciary breaches.¹⁵

At the same time, we recognize that a holding that assets held by insurance companies pursuant to contracts like GAC 50 are "plan assets" would provide significant added legal protections against losses by pension plans,

¹⁴ Under ERISA, insurers may apply for individual or class exemptions from the prohibited transaction rules. See 29 U.S.C. 1108; 29 C.F.R. 2570.30-2570.52. The Secretary may grant such exemptions for transactions that would otherwise be prohibited under ERISA, but the standards for doing so are fairly stringent. In particular, the Secretary must find that such an exemption would be "(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan." 29 U.S.C. 1108(a).

¹⁵ Because of the disruptions that would result from a ruling that (contrary to the interpretation of Section 401(b)(2) provided by the Department of Labor) insurance companies are fiduciaries under ERISA with respect to funds held in their general accounts to provide for payment of fixed annuities, if this Court agrees with the court of appeals, it should direct the lower courts to consider on remand whether the ruling should have only prospective effect. Compare *American Trucking Ass'n, Inc. v. Sheiner*, 483 U.S. 266, 297-298 (1987).

because ERISA imposes restrictions not currently provided by contract and insurance law. But without disputing that the contract in this case may have proved to be onerous to Harris Trust in certain respects, there has been no systematic showing of a pressing need to reconsider on policy grounds the government's long-standing interpretation of the scope of the guaranteed benefit policy exception. Thus, it remains our view that the fiduciary standards and associated enforcement provisions of ERISA are not available to rescue plan sponsors and trustees, who are themselves fiduciaries, from the adverse consequences of their contractual choices.

D. The Department Of Labor's Construction Of Section 401(b)(2) Is Entitled To Deference

Although the court of appeals recognized that Interpretive Bulletin 75-2 stated that assets held by an insurance company in a general account, pursuant to a contract of insurance, are not plan assets, the court believed that IB 75-2 could be distinguished from this case. See Pet. App. A12-A13. Specifically, the court noted that the Department determined in IB 75-2 that assets like those at issue here are not plan assets for purposes of ERISA's prohibited transaction provisions, and suggested that a different rule could apply with respect to ERISA's general fiduciary duty provisions. Pet. App. A13. Contrary to the court of appeals' view, we do not see how the same assets can be considered plan assets for purposes of the fiduciary duty provisions but not for purposes of the prohibited transaction provisions. There is no textual basis for such a distinction. To the contrary, Section 401(b)(2) states that the assets of a "guaranteed benefit

policy" are not plan assets, and nowhere suggests that they may be plan assets for some purposes but not others.¹⁶

Thus, IB 75-2 necessarily reflects an interpretation of Section 401(b)(2) as exempting the assets described by it from all of ERISA's fiduciary rules, including those set out in the prohibited transaction provisions. In fact, in response to an inquiry concerning ERISA's general fiduciary requirements, the Department in 1975 issued a one-page advisory opinion stating that "[o]ur latest interpretative bulletin, ERISA IB 75-2, * * * makes clear that when a plan purchases a policy or policies on an insurance company's general assets account, the plan assets consist of the policy, and not the underlying assets of the insurance company." AO 75-79, Pet. Br. App. A103. Thus, 18 years ago the Department rejected the distinction proposed by the court of appeals.

The court of appeals incorrectly thought that two advisory opinions issued by the Department of Labor contradicted the interpretation set out in IB 75-2. Pet. App. A11-A12. As we have already noted, the first of those advisory opinions, AO 78-8A, clarified that, consistent with IB 75-2, assets held in an insurance company's general account are plan assets if they provide for the payment of variable annuities rather than fixed annuities, and explained that the Department had been under the erroneous impression in 1975, when it issued the Interpretive Bulletin, that general account assets were always used to provide for the payment of fixed annuities. AO 78-8A, Pet. Br. App. A107. Thus, AO 78-8A was not truly contradictory to IB 75-2, and it is certainly not incon-

¹⁶ Moreover, the purposes of the general fiduciary duty provisions of Section 404 of ERISA and the prohibited transaction provisions of Section 406 of ERISA are complementary. The transactions prohibited by Section 406 of ERISA—such as the sale or exchange of property between a plan and a plan sponsor—are the sort of transactions that have a high potential for abuse, and frequently result in fiduciary breaches. See *Donovan v. Cunningham*, 716 F.2d 1455, 1464-1465 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

sistent with the Department's position in this case. In fact, AO 78-8A illustrates our understanding of the meaning of the phrase "to the extent that" in Section 401(b)(2)(B).

Nor is AO 83-51A in tension with the Department's other pronouncements or its position in this case. That advisory opinion dealt with a situation that was the converse of the one considered in AO 78-8A: the use of separate accounts to provide entirely fixed contractual obligations. The account at issue in AO 83-51A provided that "neither the amount payable (or credited) to the plan or to any participant or beneficiary of the plan (including an annuitant) is affected in any way by the investment performance of the separate account." AO 83-51A, Pet. Br. App. A112. Because the second sentence of Section 401(b)(2)(B) states that, except for any surplus in a separate account, "any other portion of a separate account" constitutes plan assets, the question in AO 83-51A was whether the account at issue—which unquestionably was separate (segregated) from the insurer's general account—was a "separate account" within the meaning of Section 3(17) of ERISA, 29 U.S.C. 1002(17). That definition does not provide that a "separate account" is any insurance account other than a general account, but instead provides that a separate account is "an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company." The Department concluded that the account at issue, while segregated from the insurer's general account, was not a "separate account" within the meaning of Section 3(17) because the return to the account was fully assured—i.e., the account experienced no gains or losses that affected either the plan or its participants. That is a reasonable interpretation of

Section 3(17). In any event, it does not call into question the Department's conclusion that assets held in a general account to provide for payment of fixed annuities are not plan assets.

The Department's established construction of Section 401(b)(2), embodied in the various rulings and statements discussed above, is reasonable and entitled to deference. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Indeed, deference is particularly appropriate here because the agency's most relevant pronouncement was issued contemporaneously with the passage of ERISA by those charged with setting the administrative and civil enforcement mechanisms in motion, and because it was brought to the attention of an oversight committee of the Congress that passed the Act, and was not questioned by any member of that committee. See *Power Reactor Development Co. v. International Union of Electrical Workers*, 367 U.S. 396, 408-409 (1961).¹⁷

In *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989), this Court noted that the Secretary of Labor "is specially authorized to define ERISA's 'accounting, technical, and trade terms.'" See 29 U.S.C. 1135. The Court therefore gave deference in *Morash* to the Department's interpretation of the term "vacation benefits" in 29 U.S.C. 1002(1). Even though the Court acknowledged that the statutory provision "may surely be read to encompass any form of regular vacation payments to an employee" (490 U.S. at 114), the Court upheld the Department's "payroll practices" regulation, which provides that ERISA covers only those vacation benefits that are provided through funds

¹⁷ The Department's failure to provide advice to the court of appeals (see Pet. App. A3-A4) does not suggest that its views are not entitled to deference. The facts of this case are complicated, the language of Section 401(b)(2) is not crystal clear, and subjecting general account assets to regulation under ERISA concededly would have some advantages for plan participants and beneficiaries. But the contract at issue is a "guaranteed benefit policy" under the Department of Labor's long-standing interpretation of that technical term.

such as those maintained for workers in the construction and longshore industries. The Court observed that a contrary interpretation that extended ERISA's coverage beyond pooled vacation trusts would upset various settled practices, without any reason to believe that Congress intended such consequences. *Id.* at 118-119. So too here. "Guaranteed benefit policy" is a technical term under ERISA, and the Court should defer to the Department's reasonable interpretation of that term rather than disrupt settled practices, in the absence of any reason to believe that Congress intended the far-reaching consequences the court of appeals' and respondents' position would produce.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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MAY 1993